(2)

No. 06-1215

Supreme Court, U.S.
FILED
APR 5 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

CLOVER PARK SCHOOL DISTRICT NO. 400
OF PIERCE COUNTY, WASHINGTON,

Petitioner,

v.

STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1
OF PIERCE COUNTY, WASHINGTON; PUGET SOUND
EDUCATIONAL SERVICE DISTRICT REGIONAL
COMMITTEE ON SCHOOL DISTRICT ORGANIZATION;
AND WASHINGTON STATE BOARD OF EDUCATION,

Respondents.

**On Petition For Writ Of Certiorari
To The Court Of Appeals Of The
State Of Washington, Division II**

BRIEF FOR STEILACOOM HISTORICAL SCHOOL DISTRICT IN OPPOSITION

CHRISTOPHER L. HIRST*
LAURA K. CLINTON
CARLOS CHAVEZ
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104
Telephone: 206-623-7580

*Attorneys for Respondent
Steilacoom Historical
School District No. 1*

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. In Washington, every litigant has the statutory right to remove an assigned trial judge by filing an affidavit of prejudice before any significant rulings occur in the case. Did the trial court properly reject a *Batson* challenge to a party's exercise of its right to remove the originally assigned trial judge where 1) there was no evidence of racial bias by that party, and 2) in response to an objection, the party provided a race-neutral reason for removal?

2. In a consolidated appeal of two state agency decisions under Washington's Administrative Procedures Act ("APA"), brought before a state trial court on a closed administrative record, is the court required by constitutional principles to allow the appealing party to seek discovery during the course of the appeal, where the APA grants the judge discretion regarding the admission of new evidence, and where the party seeking discovery fails to explain why discovery is necessary to the prosecution of its appeal?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
1. Order Reassigning Original Trial Judge	2
2. Orders Quashing Discovery	5
3. The Subsequent Appeals	6
REASONS FOR DENYING THE PETITION	7
1. Clover Park's Motion to Vacate the Order Reassigning the Case Was Properly Denied	7
2. Washington's Statutory Provisions Limiting the Admission of New Evidence During an APA Appeal Do Not Violate Due Process	17
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Barrington v. Eastern Washington Univ., 41 Wn. App. 259, 703 P.2d 1066 (1985) 20

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986) ..... *passim*

Bridle Trails Cmty. Club v. City of Bellevue, 45 Wn. App. 248, 724 P.2d 1110 (1986) 20

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 105 S.Ct. 1598 (1985) 18

Harbor Enterprises, Inc. v. Gudjonsson, 116 Wn.2d 283, 803 P.2d 798 (1991) 8

Hernandez v. New York, 500 U.S. 352, 114 L.Ed.2d 395 (1991) 16

Island County v. State, 135 Wn.2d 141, 955 P.2d 377 (1998) 19

Johnson v. California, 545 U.S. 162, 125 S.Ct. 2410 (2005) 14, 15

Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317 (2005) 14

Penberthy Electromelt v. U.S. Gypsum, 38 Wn. App. 514, 686 P.2d 1138 (1984) 17

People v. Superior Court and Williams, 8 Cal. App. 4th 688, 10 Cal. Rptr.2d 873 (1992) 10, 11, 12, 13, 16

Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County, 98 Wn.2d 690, 658 P.2d 648 (1983) 20

State v. Belgarde, 119 Wn.2d 711, 837 P.2d 599 (1992) 8

TABLE OF AUTHORITIES – Continued

Page

State v. Waters, 93 Wn. App. 969, 971 P.2d 538 (1999) 8

State of Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 70 S.Ct. 252 (1950) 12

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975) 9

Washington Indep. Tel. Ass'n v. Washington Util. & Trans. Comm'n, 110 Wn. App. 498, 41 P.3d 1212 (2002) 17, 18

STATUTES

Revised Code of Washington 4.12.040 ..... 1, 2

Revised Code of Washington 4.12.050 ..... 1, 2

Revised Code of Washington, ch. 28A.315 20

Revised Code of Washington 34.05.510 ..... 1, 2

Revised Code of Washington 34.05.558 ..... 1, 18, 19

Revised Code of Washington 34.05.562 ..... 1, 18, 21, 22

Revised Code of Washington 42.17.562 21

Revised Code of Washington 42.30.130 21

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Steilacoom Historical School District No. 1 of Pierce County, Washington ("Steilacoom") respectfully requests that the Court deny the Petition for Writ of Certiorari ("Petition") filed by Clover Park School District No. 400 ("Clover Park").

STATUTORY PROVISIONS INVOLVED

Washington's statutory provisions governing a litigant's right to file an affidavit of prejudice against an assigned trial judge and have a case reassigned are set out in the Revised Code of Washington ("RCW") 4.12.040 and RCW 4.12.050.

The provisions of Washington's Administrative Procedure Act that are relevant to the question of whether and when a trial court reviewing an agency decision on an administrative record may allow the submission of additional evidence include RCW 34.05.510 (Relationship between this chapter and other judicial review authority); RCW 34.05.558 (Judicial review of facts confined to record); and RCW 34.05.562 (New evidence taken by court agency).

For the Court's convenience, these statutory provisions are contained in the attached Appendix.

STATEMENT OF THE CASE

This case arises out of a state trial court's review of two agency administrative orders: 1) the Puget Sound

Educational Service District Regional Committee's ("Regional Committee's") decision to grant Steilacoom's application to adjust a district boundary line and transfer territory from Clover Park to Steilacoom; and 2) the State Board of Education's subsequent order upholding the Regional Committee's decision. Pet. App. C (trial court order); Pet. App. Y (Regional Committee Decision); Pet. App. W (State Board Order).[1] Dissatisfied with both the Regional Committee's decision and the State Board's review, Clover Park petitioned for judicial review under Washington's Administrative Procedure Act ("APA"), RCW 34.05.010, *et seq.* Pet. App. V (appeal petition). The current Petition seeks review of two trial court rulings made during Clover Park's appeal.

1. Order Reassigning Original Trial Judge

All litigants in Washington's state courts have a statutory right to remove an assigned trial judge in the initial stages of a case by filing an affidavit of prejudice. RCW 4.12.040-.050. In this case, Steilacoom filed an Affidavit of Prejudice and corresponding motion regarding the trial judge initially assigned to hear Clover Park's petition for judicial review. Pet. App. U (affidavit); Pet. App. T (motion). It is undisputed that this filing fully complied with all statutory requirements. *See* Pet. App. Q at 104a (Clover Park acknowledges that filing "follow[s] the common practice"). Although the statute creates an absolute right, Clover Park opposed the motion, raising a

[1] The Clerk's Papers in the court file are cited as "CP," while the agency Administrative Record is referenced as "AR." Where material was included in the Appendices to Clover Park's Petition, it is cited as "Pet. App. __ at [page]."

Batson-type challenge and speculating that Steilacoom had a racial motive for filing the affidavit of prejudice because the originally assigned judge was African-American. Pet. App. Q.

Clover Park asserted the following facts as the sole basis for its challenge to Judge Grant's removal: in its petition for review, Clover Park alleged that that the boundary adjustment would have "racially segregative effects"; Judge Grant was one of "few African-American members" of the county bench; and that "without stating any reason, Steilacoom . . . has attempted to peremptorily remove her from the matter." Pet. App. Q at 105a-106a (Opp'n to Mtn of Prejudice). *See also* Pet. App. O at 98a (Mtn to Vacate) ("Clover Park's motion to vacate is based upon the grounds set forth in its Opposition . . . ").

Although Clover Park's assertions did not demonstrate any improper motive for the affidavit of prejudice, Steilacoom responded to Clover Park's challenge, explaining its decision to submit an affidavit of prejudice and denying any racial motive. In these sworn statements, Steilacoom explained that Judge Grant regularly brought suit against school districts when she was in private practice, with a particular emphasis on claims of malfeasance and mistakes by school districts. *See* Pet. App. M at 93a-94a (sworn declaration of counsel explaining that affidavit was based on experience with Judge Grant during private practice and her previous practice of suing school districts for malfeasance); Pet. App. N at 95a-96a (sworn declaration of Steilacoom's Superintendent also recounting experience with Judge Grant's prior private practice). *See also* Pet. App. L at 83a (Steilacoom's Opp'n to Mtn to Vacate) ("Steilacoom emphatically denies Clover Park's assertion that Steilacoom's Motion of Prejudice was

'motivated by race.'"). As Steilacoom repeatedly explained, its decision had nothing whatsoever to do with Judge Grant's race. *See also* Pet. App. I at 64a (statement of counsel at oral argument).

In response, Clover Park claimed that Steilacoom's stated basis for removing Judge Grant was inadequate. Pet. App. J (Reply on Mtn to Vacate). Clover Park claimed that the sworn declarations were also fundamentally flawed because they did not specifically deny that race was a factor or influence in the decision to file an affidavit of prejudice. Pet. App. J at 77a. In addition to its other allegations, Clover Park pointed to two prior statements as evidence of racial bias. In the first, Steilacoom's counsel addressed Clover Park's belated constitutional claims in oral argument before the Regional Committee by saying, in part:

> . . . if you have any questions about the constitutional issues that Clover Park raised, I have a one-page supplemental submission of actual legal argument with authority that tells you that that argument is simply baloney. [Pet. App. Z at 148a]

The second statement was drawn from a passage in Steilacoom's brief to the State Board that described Clover Park's wholesale failure to support its constitutional claims about the boundary adjustment with any relevant evidence or legal analysis. The passage referred to "Clover Park mak[ing] its constitutional claims with bravado . . . ". AR 121. Clover Park claimed that the totality of these facts gave rise to an unrebutted inference that Steilacoom's affidavit of prejudice was motivated by racial discrimination. *See generally* Pet. App. J.

In response to Clover Park's stated concerns about the declarations, Steilacoom provided the trial court with a second sworn declaration of Steilacoom's Superintendent that confirmed that Judge Grant's race was not a factor in the decision to file an affidavit of prejudice. *See* Pet. App. I at 64a.[2] Judge Sergio Armijo, the trial judge assigned to hear Clover Park's motion, reviewed the parties' submissions and oral argument, found no basis to vacate the reassignment, denied the motion, and retained the case. *See* Pet. App. I at 72a-73a (oral ruling); Pet. App. H (order).

2. Orders Quashing Discovery

A few months later, Steilacoom filed a motion for summary judgment based on the administrative record and seeking dismissal of all Clover Park's claims. CP 170-216. The motion was set for hearing, giving Clover Park over a month to respond. CP 170. After Steilacoom filed the motion, and despite the APA's limitations on admitting new evidence, Clover Park served written discovery requests on Steilacoom, the Regional Committee, and the State Board. *See* CP 233-43; 301-09; 442-49. Each of these parties moved to quash, arguing that the limited grounds available for additional discovery in an APA appeal were not present.[3] CP 222-336. Following oral argument, the

---

[2] This document, submitted during oral argument, does not appear to have been placed in the official court file. Its existence, however, is confirmed by the references to it during the hearing. *See* Pet. App. I at 64a, 71a.

[3] The responding parties consistently maintained that discovery was not appropriate or allowed. *See, e.g.*, CP 810-11 ("As the judicial review of these administrative orders does not require, and in most regards prohibits the consideration of evidence beyond the administrative

(Continued on following page)

trial court entered orders quashing Clover Park's discovery requests. Pet. App. D & E (orders). Despite its contention that discovery was necessary, Clover Park never claimed (by affidavit under Washington Civil Rule 56(f)[4] or otherwise) that it was unable to respond to Steilacoom's dispositive motion. Indeed, Clover Park filed several of its own motions for partial summary judgment, apparently without need of the material it sought in discovery. CP 398-420; 454-59.

3. The Subsequent Appeals

On February 4, 2005, Judge Armijo granted Steilacoom's motion for summary judgment, dismissing Clover Park's consolidated APA appeal. Pet. App. C. Clover Park appealed to the Court of Appeals for the State of Washington, Division II, which affirmed. Pet. App. B. Clover Park then sought discretionary review from the Washington Supreme Court, which denied its petition on December 5, 2006. Pet. App. A. Before this Court, Clover Park seeks review of the portion of the Court of Appeals' opinion affirming the trial court's orders 1) denying Clover Park's motion to vacate the reassignment of the trial judge and 2) quashing its discovery requests.

---

records, Steilacoom believes that witness disclosures do not apply to this case.").

[4] *See* Washington Superior Court Civil Rule 56(f) ("Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had . . . ").

REASONS FOR DENYING THE PETITION

Clover Park has not established any basis for further review of this school district boundary dispute. The claim that Steilacoom's affidavit of prejudice must be subjected to equal protection analysis is undercut by Clover Park's utter failure to satisfy any of the standards it claims should apply to such a review. There is no reason to believe that the various state statutes allowing peremptory judicial removal are subject to widespread abuse, nor is there any basis in the record of this case to develop new standards for the review of such peremptories.

Clover Park's contention that this Court should accept review of its discovery dispute under constitutional principles is equally meritless. The trial court acted well within its discretion in reviewing Clover Park's claims on the administrative record. Because Clover Park failed to establish how discovery would lead to new evidence admissible under the APA, made no offer of proof for what it believed discovery would show, and participated without reservation in the briefing of dispositive motions to the trial court, its request for review of this issue should be denied.

1. Clover Park's Motion to Vacate the Order Reassigning the Case Was Properly Denied.

Clover Park asks the Court to extend *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), to state statutes allowing a litigant to remove an assigned trial judge. There is scant legal support for analogizing *Batson* and its progeny to this context. More importantly, there is no evidentiary support for Clover Park's claims. Because Clover Park did not make out a prima facie case of racial

bias, as would be required under any equal protection analysis, this Court should not reach the constitutional issue of whether or not state courts should undertake a *Batson*-type inquiry into affidavits of prejudice filed against trial judges.

In Washington, litigants have the right – once in every case – to remove the initially assigned trial judge and have their matter reassigned to another judge. This right and the procedure for invoking it are spelled out in RCW 4.12.040-.050. Once a party properly invokes the statute, reassignment is mandatory. The Washington Supreme Court "has made it abundantly clear that any party to a suit has the right to remove one superior court judge from a case subject only to the timely filing of a motion and affidavit in compliance with RCW 4.12.040 and .050." *State v. Waters*, 93 Wn. App. 969, 974, 971 P.2d 538 (1999). *See also State v. Belgarde*, 119 Wn.2d 711, 715, 837 P.2d 599 (1992) ("If a party complies with the statutory provisions, prejudice is deemed established, and the judge no longer has authority to proceed further into the merits of the case."). The right is unilateral and does not require the consent of the other party, although the other party has a corresponding right that it may invoke after the case is reassigned.

It is undisputed that Steilacoom's motion and affidavit of prejudice complied with all statutory requirements. *See* Pet. App. Q at 104a (Clover Park's admission that Steilacoom's filings followed standard practice). Under Washington law, that ends the inquiry: "The cases uniformly have held that there is no discretion in granting a timely motion." *Harbor Enterprises, Inc. v. Gudjonsson*, 116 Wn.2d 283, 291, 803 P.2d 798 (1991) (rejecting contention

that exercise of right to a change of judge is subject to scrutiny).

Despite the language of the statute and the cases interpreting it, Clover Park claimed that it could demand a *Batson*-type review of Steilacoom's affidavit of prejudice merely by alleging that its appeal involved allegations of discrimination and therefore Steilacoom may have had an improper motive for removing the African-American trial judge. Pet. App. Q at 106a. Clover Park now asks this Court to rule that *Batson* applies in this context and that the trial court should have vacated the order transferring the case under equal protection principles.

Clover Park asserts that peremptory removal of a single judge should be subject to constitutional scrutiny in the same fashion as are peremptory challenges to jurors. This assertion is doubtful: the respective roles and characteristics of judges and juries in our court system counsel against such inquiry. A jury is a panel of individuals chosen from a pool of lay people that is constitutionally required to fairly represent the community. *See Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692 (1975). Exclusion from a jury based on one's group destroys the representative nature of the jury pool. *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712 (1986) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)). Judges hold a different place in the American legal system. Although diversity on the bench is undoubtedly a positive thing, there is no constitutional requirement that the composition of the bench in an area represent a cross-section of that community. Thus, the foundation of *Batson* and its progeny is absent in this context.

Clover Park's lone authority for its position is a decision by a California court analyzing a comparable statute. *See People v. Superior Court and Williams*, 8 Cal. App. 4th 688, 701-05, 10 Cal. Rptr.2d 873 (1992) ("*Williams*") (rejecting defendant's claim that African-American judge was removed based on race). In *Williams*, an African-American criminal defendant successfully raised a *Batson* challenge to the prosecutor's use of peremptory challenges to remove African-American women from the jury pool. *Id.* at 695. After several mistrials, including one prompted by defendant's *Batson* motion, the case was reset for trial before a male African-American judge. Pursuant to a California statute similar to the Washington statute at issue here, the prosecutor in *Williams* filed an affidavit of prejudice and sought reassignment of the case. The defendant challenged the affidavit of prejudice, claiming that *Batson* should also apply to the peremptory removal of judges and that the prior finding of improper motive in the prosecutor's use of jury peremptories gave rise to the inference that his peremptory removal of the judge was likewise based on racial bias. *Id.* at 709-10.

In rejecting the *Batson* analogy offered by the defendant and urged here by Clover Park, the court stated, "Far from compelling, the analogy between peremptory challenges to prospective jurors and to judges is attenuated, so much so that the appropriateness of the analysis and procedures in *Batson* and [*People v. Wheeler*, 22 Cal.3d 258 (1978)] to [statutory] peremptory challenges [to judges] is hardly self-evident." *Id.* at 704, *see also id.* at 703-04 (a peremptory challenge to the judge is "not analogous to a peremptory challenge to a prospective juror.").

While rejecting the *Batson* analogy, *Williams* did apply an equal protection test to the peremptory challenge

at issue. *Id.* at 708. Under *Williams*, the party alleging that another party's peremptory removal of a judge was made

> solely on the ground of group bias bears an initial burden of establishing a prima facie case of invidious discrimination; if a prima facie case is established, the adversary then assumes the burden of demonstrating that the preemptory challenge was not predicated on group bias alone; if the adversary offers a race-neutral basis for the peremptory challenges, the trial court determines whether or not the charging party, here the defendant, has established purposeful discrimination.

Id. at 708 (citations omitted). *Williams* also explained in no uncertain terms that such review is not "mandated whenever the opposing party nakedly asserts that challenge to a judge was race-based." *Id.* at 707.

Under this analysis, which Clover Park urges the Court to adopt, the challenging party must make a prima facie showing of "facts and any other relevant circumstances which raise an inference that the [other party] excluded the judge on account of his race." *Id.* at 708-09. Thus, *Williams* requires as a threshold matter evidence of purposeful or intentional discrimination in the use of a peremptory removal. *Id.* at 708. Likewise, the "party charging that his adversary has used a [peremptory] challenge in a manner violating equal protection bears the burden of proving purposeful discrimination." *Id.* Contrary to Clover Park's assertions, Pet. at 7, the instant case does not conflict with *Williams*, as Clover Park failed to make a threshold showing of racial discrimination.

Because the record in this case does not indicate that Steilacoom's affidavit of prejudice was filed for an improper purpose, this Court should not reach the constitutional issue of whether or not state courts should undertake a *Batson* or *Williams*-type inquiry into the disqualification of trial judges when an opposing party can make such a showing. *See, e.g., State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918, 70 S.Ct. 252 (1950) (identifying poor record as potential basis for declining to issue a writ of certiorari).

Clover Park failed, under any formulation of equal protection principles, to make out a prima facie case of improper motive on Steilacoom's part. Clover Park's own description of its entire prima facie case of racial bias demonstrates that it fails to meet the standards it urges this Court to adopt:

> . . . the case is one in which issues of race and discrimination against minority students is important; Judge Grant is African-American; and Steilacoom offers no justification at all for asserting that Judge Grant is prejudiced toward Steilacoom and its counsel.

Pet. App. Q at 106a. As to Clover Park's first allegation, every tribunal to consider Clover Park's discrimination argument has rejected it, because Clover Park mustered no evidence of either adverse impact or discriminatory intent with regard to the boundary adjustment. *See* Pet. App. C at 26a-27a ("There is no Record evidence to support Clover Park's assertion that the transfer would exacerbate existing racial or economic divisions . . . nor does the Record reflect racially segregative intent."); Pet. App. B at 10a (Court of Appeals rejecting claim due to lack of evidence of disparate impact). Particularly given the absence

of any evidentiary support, Clover Park's bare assertion that race issues are central to its substantive case cannot and should not give rise to an inference of improper motive.

Next, Clover Park suggests that a reviewing court may infer a racially improper motive from the mere fact that a party has filed an affidavit of prejudice against an African-American trial judge. Pet. at 9. If that fact alone were sufficient to trigger further review, any removal of a judge from a racial minority group would be suspect and subject to additional scrutiny. *Cf. Williams*, 8 Cal. App.4th at 707 (inquiry into removal is not "mandated whenever the opposing party nakedly asserts that challenge to a judge was race-based."). *See also Batson*, 476 U.S. at 101 (White, J., concurring) ("it is not unconstitutional, without more, to strike one or more blacks from the jury"). In *Williams*, the court found that the group identities of excluded African-American women jurors and of the male African-American judge removed by the affidavit of prejudice were not sufficiently coextensive to raise an inference of a pattern of racial decision-making. 8 Cal. App.4th at 710. Here, the overlap between the group identity of a female African-American judge and the Clover Park School District (or, alternatively, its student body, comprising both majority and minority students from a variety of diverse backgrounds), is nonexistent. The fact that Judge Grant is African-American does not give rise to a presumption of discriminatory intent.

Finally, as both the trial court and the Court of Appeals noted, "a party may file an affidavit of prejudice as a matter of right without any further showing." Pet. App. B at 20a (Court of Appeals opinion). Steilacoom's affidavit and motion undisputedly complied with the statute.

Where no further explanation of the perceived prejudice is required by the statutory provisions, the *absence* of such additional explanation of Steilacoom's grounds for filing in its original affidavit of prejudice cannot give rise to an inference of discrimination. Clover Park's citation of *Johnson v. California*'s "unlikely hypothetical" footnote, which explained that if a challenging party makes out a prima facie case of discrimination, the other party's refusal to explain use of a peremptory may further support the inference of discrimination, is not on point. Pet. at 11 (citing 545 U.S. 162, 171 n. 6, 125 S.Ct. 2410). *Johnson* does not suggest that silence alone is sufficient to establish a prima facie case. When challenged, Steilacoom gave ample non-race-related justifications for its actions. The fact that these were not contained in its original affidavit (which was not required and would not have been appropriate) cannot be evidence of discriminatory intent.

As its basis for challenging Steilacoom's affidavit of prejudice, Clover Park offers its own speculation and two race-neutral epithets ("baloney" and "bravado") that Steilacoom's counsel used to describe Clover Park's constitutional claims, claims that three levels of Washington courts have since rejected. *See* Pet. App. Q at 106a; Pet. App. J at 74a. This "evidence" does not remotely suggest that Steilacoom had an improper racial motive in filing its affidavit of prejudice, and it is substantially more tenuous than the assertion of race-based decision-making rejected in *Williams*. 8 Cal. App.4th at 707.

Unlike the *Batson* cases on which Clover Park relies, there is no evidence here of a pattern of race-based decision-making. *Compare, e.g., Miller-El v. Dretke*, 545 U.S. 231, 236, 254, 255-56, 261, 125 S.Ct. 2317 (2005) (significant evidence of prosecutorial misconduct, including use of

peremptory strikes against 10 of 11 qualified African-American potential jurors (91%), suspicious and unexplained use of a "jury shuffle" to reorder the venire panel on several occasions, different descriptions of the death penalty used with questioning of African-American jurors versus white jurors, and deliberately incomplete questions on minimum sentencing posed to African-American jurors in an attempt to create for-cause strikes); *Batson*, 476 U.S. at 83 (1986) (prosecutor struck all African-Americans from venire); *Johnson*, 545 U.S. 162 (prosecutor struck all potential African-American jurors) (all cases cited by Clover Park, Pet. at 8). Clover Park's allegations do not meet the standards for a prima facie showing established by these cases.[5]

Even if Clover Park's accusations could meet the threshold showing for an equal protection inquiry, Steilacoom responded to Clover Park's challenge by explaining its decision to submit an affidavit of prejudice. *See* Pet. App. M at 93a-94a (sworn declaration of counsel explaining that affidavit was based on experience of Judge Grant's private practice and her previous practice of suing school districts for malfeasance); Pet. App. N at 95a-96a (sworn declaration of Steilacoom's Superintendent also recounting experience with Judge Grant's prior private practice). *See also* Pet. App. I at 64a (statement of counsel at oral argument). All record evidence indicates that Steilacoom's prior experience with Judge Grant during her years of private practice was the basis of the affidavit of prejudice, not the Judge's race. Judge Armijo, the trial

[5] Indeed, Steilacoom had at least one other case pending before Judge Grant, a case in which Steilacoom's conduct was not at issue and in which it did not file an affidavit of prejudice. Pet. App. N at 96a.

judge assigned to hear Clover Park's motion, reviewed the parties' submissions and oral argument and found no basis to vacate the reassignment. *See* Pet. App. I at 72a-73a (oral ruling); Pet. App. H (order). There is no basis to overturn the trial court's ruling.[6]

Unable to prove a prima facie case, Clover Park insists that Steilacoom's race-neutral explanation is inadequate because Steilacoom's *counsel* never swore under oath that race was not a factor in the decision to file an affidavit of prejudice. Pet. at 10. Clover Park ignores the fact that Steilacoom did make such a sworn statement. *See* Pet. App. I at 64a (Steilacoom provided the trial court and counsel with a second sworn declaration of Steilacoom's superintendent that affirmed that Judge Grant's race was not a factor in the decision to file an affidavit of prejudice). Clover Park's contention that *Batson* or *Williams* requires something in addition to or different from the explanations Steilacoom provided is unfounded. *Hernandez v. New York*, 500 U.S. 352, 360, 114 L.Ed.2d 395 (1991) (regarding the validity of an explanation for exercise of a peremptory, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.").

---

[6] Even if Clover Park could make out a constitutional challenge on the record of this case, it is not at all clear that its requested relief (vacation of the trial court's substantive ruling and remand) is appropriate. As noted, this matter came before the trial court as an administrative appeal. Pet. App. V. The Court of Appeals subsequently reviewed the trial court's ruling on a de novo basis. Pet. App. B at 8a (Court of Appeals conducted same inquiry as trial court). Thus, Clover Park has already had the benefit of a second full review of its substantive allegations.

Contrary to Clover Park's repeated assertions, this case does not concern "motions of prejudice that are based on openly stated racial bias . . . ". Pet. at 8. There is no evidence suggesting that the right to file an affidavit of prejudice was misused here or that a ruling setting a new standard for the review of such affidavits is necessary. There is no need for the Court to reach the constitutional issues that Clover Park presses here, as the record contains no facts that might trigger such constitutional analysis. There being no basis to reverse the trial court's order, Clover Park's request for review should be denied.

2. Washington's Statutory Provisions Limiting the Admission of New Evidence During an APA Appeal Do Not Violate Due Process.

After filing its petition for review in the trial court under Washington's APA, Clover Park sought discovery from Steilacoom and the two administrative agencies. CP 233-43; 301-09; 442-49. Those parties objected, and the trial court quashed the discovery requests after receiving briefing[7] and argument on the issue. Pet. App. D & E (orders). The trial court's refusal to allow Clover Park to engage in discovery was reviewed for abuse of discretion by the Court of Appeals. *Washington Indep. Tel. Ass'n v. Washington Util. & Trans. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002); *see also Penberthy Electromelt v. U.S. Gypsum*, 38 Wn. App. 514, 521, 686 P.2d 1138 (1984). The Court of Appeals found no error. Pet. App. B at 18a-19a. The Washington Supreme Court declined further review. Clover Park now claims that the orders quashing

[7] The Motions to Quash are in the record at CP 222-60 & 297-317.

that discovery were unconstitutional and asks this Court to review its discovery dispute. Pet. at 11.

Under Washington law, an APA appeal is generally limited to the agency record. RCW 34.05.558. "A court may take evidence in addition to the agency record only if it relates to the validity of the agency action and is needed to decide disputed issues regarding improper agency action, unlawfulness of procedure, or material facts not required to be determined on the agency record." *Washington Indep. Tel. Ass'n*, 110 Wn. App. at 518 (trial court did not abuse discretion by deciding case on administrative record rather than allowing additional discovery); *see also* RCW 34.05.562(1) (explaining limited grounds on which court may determine that additional evidence is appropriate). This is hardly a radical notion: the federal Administrative Procedure Act has similar provisions. *See* 5 U.S.C. § 706 (limiting judicial review, with certain exceptions, to agency record). The fact that review of an agency decision is conducted on the administrative record that was before that agency is consistent with accepted appellate principles and is not constitutionally troubling. "'[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'" *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743, 105 S.Ct. 1598 (1985) (quoting *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241 (1973)).

Clover Park argues that the trial court abused its discretion by denying Clover Park the opportunity to seek discovery on its alleged constitutional claims. Pet. at 13-14. But this case does not implicate any student's right to receive a public education or any individual personal or property rights. Rather, the issue before the administrative agency was whether common boundary line between

two public school districts should be adjusted – all eligible students will attend one of the two districts under any scenario. Clover Park had the opportunity before the Regional Committee to submit evidence, testimony, and argument in support of its claims that the boundary adjustment was somehow unconstitutional. It failed to provide evidence of either disparate impact or discriminatory intent. *See* Pet. App. C at 26a-27a ("There is no Record evidence to support Clover Park's assertion that the transfer would exacerbate existing racial or economic divisions . . . nor does the Record reflect racially segregative intent."); Pet. App. B at 10a (Court of Appeals rejects claim due to lack of evidence of disparate impact). Failure to make a factual record in support of one's claims is not good cause for the admission of additional evidence on appeal. *See* RCW 34.05.558.

Clover Park does not contend that it met the APA's standards, or that the trial court misapplied the law. In essence, Clover Park claims that the APA's limits on the admission of new evidence violate due process. To make out such a claim, however, Clover Park would face a substantial burden of proof under Washington law. *See, e.g., Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998) (Washington statutes are presumed constitutional). It has not come close to meeting that burden, either here or in its briefing to prior courts.

Clover Park also claims that it needed discovery to address Steilacoom's "new" defense to its constitutional challenges. Pet. at 14. This defense admittedly consisted solely of Steilacoom's legal argument that Clover Park had failed to muster evidence of the two elements necessary to prevail on its constitutional claim, namely disparate impact and intentional discrimination. *Id.* Clover Park's

attempt to demand – as a constitutional right – discovery during the appeal phase of its litigation because it failed to create an administrative record to support its claims is circular and should be rejected.

Clover Park next invokes the inherent power of the trial court under the Washington State Constitution to review constitutional claims as an independent ground for granting discovery. *Id.* at 12, *see also* Pet. App. V at 123a. Clover Park's reliance on the trial court's inherent power is itself an admission that neither Chapter 28A.315 RCW (governing the organization of school districts and boundary changes) nor Chapter 34.05 RCW (the APA) support disregarding the limited administrative review of this matter.

Moreover, a trial court's exercise of its inherent authority to review claims, where applicable, is also limited to the administrative record under Washington law. "Judging whether [an agency's] decision was arbitrary and capricious requires an evaluation of the evidence produced at hearing." *Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983) (reversing trial court's decision pursuant to constitutional writ of certiorari that civil service commission decision was arbitrary and capricious, where the evidence produced at the administrative hearing did not support finding); *Bridle Trails Cmty. Club v. City of Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986) ("review by 'constitutional' or 'common law' certiorari is not full appellate review on the merits. It is limited to a review of the record below . . . ") (citation omitted); *Barrington v. Eastern Washington Univ.*, 41 Wn. App. 259, 263, 703 P.2d 1066 (1985) ("Review is limited to the record of the administrative tribunal."). Thus, there is no basis in either the

governing statutes or the trial court's inherent authority to demand civil discovery during an appeal.

Clover Park asserts that the trial court's orders quashing discovery deprived it of the ability to investigate its speculative claim that the Regional Committee may have discussed the boundary adjustment petition outside of public hearings. Pet. at 13. This contention, too, is meritless.

Clover Park's belated procedural claim did not warrant circumvention of the APA's strict limitations on the addition of new evidence. *See* RCW 42.17.562. Clover Park could have raised and sought timely relief for alleged Open Public Meeting Act violations prior to the completion of the proceedings before the Regional Committee. RCW 42.30.130. Clover Park concedes that the "evidence" of contact among Committee members was "discovered" on the record at the March 3, 2004 Committee hearing. Appellant's Opening Brf. to Court of Appeals at 40. At that meeting, Clover Park could have raised its challenge directly with the Committee and sought a continuance of the hearing to explore its alleged concerns or sought relief pursuant to RCW 42.30.130. Alternatively, Clover Park could have requested public records from the Committee and raised its concerns about procedural violations before the State Board. Clover Park chose to do neither. Instead, Clover Park tried to use speculation about Committee practices as a basis to seek discovery from all responding parties, notwithstanding the limitations of RCW 34.05.562 upon the introduction of new evidence. Pet. App. F at 39a-41a.

Clover Park failed to explain to the trial court how its requests were necessary to its appeal or how they fit

within the APA's provisions. As the Court of Appeals noted, "Clover Park has made no offer of proof as to what information it hoped to add to the record." Pet. App. B at 19a. Further, Clover Park responded to Steilacoom's dispositive motion – and filed its own motions for summary judgment – without recourse to the discovery it now claims to need. The trial court properly exercised its discretion to reject Clover Park's attempt to circumvent RCW 34.05.562. Clover Park's request that this Court review the trial court's orders quashing discovery should be denied.

CONCLUSION

The trial court properly refused to vacate the order reassigning this case to a new trial judge and acted well within its discretion in reviewing this APA appeal upon the administrative record. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHRISTOPHER L. HIRST*
LAURA K. CLINTON
CARLOS CHAVEZ
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104
Telephone: 206-623-7580

Attorneys for Respondent Steilacoom Historical School District No. 1

**Counsel of Record*

April 5, 2007

Wash. Rev. Code 4.12.040
Prejudice of judge, transfer to another department, visiting judge – Change of venue generally, criminal cases.

(1) No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court. In all judicial districts where there is only one judge, a certified copy of the motion and affidavit filed in the cause shall be transmitted by the clerk of the superior court to the clerk of the superior court designated by the chief justice of the supreme court. Upon receipt the clerk of said superior court shall transmit the forwarded affidavit to the presiding judge who shall direct a visiting judge to hear and try such action as soon as convenient and practical.

(2) The presiding judge in judicial districts where there is more than one judge, or the presiding judge of judicial districts where there is only one judge, may send a case for trial to another court if the convenience of witnesses or the ends of justice will not be interfered with by such a course and the action is of such a character that a change of venue may be ordered: PROVIDED, That in criminal prosecutions the case shall not be sent for trial to any court outside the county unless the accused shall waive his right to a trial by a jury of the county in which the offense is alleged to have been committed.

Wash. Rev. Code 4.12.050
Affidavit of prejudice.

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

Wash. Rev. Code 34.05.510
Relationship between this chapter and other judicial review authority.

This chapter establishes the exclusive means of judicial review of agency action, except:

(1) The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by court rule.

(3) To the extent that de novo review or jury trial review of agency action is expressly authorized by provision of law.

Wash. Rev. Code 34.05.554
Limitation on new issues.

(1) Issues not raised before the agency may not be raised on appeal, except to the extent that:

(a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;

(b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;

(c) The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this chapter; or

(d) The interests of justice would be served by resolution of an issue arising from:

(i) A change in controlling law occurring after the agency action; or

(ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

(2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

Wash. Rev. Code 34.05.558
Judicial review of facts confined to record.

Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter.

Wash. Rev. Code 34.05.562
New evidence taken by court or agency.

(1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

(b) Unlawfulness of procedure or of decision-making process; or

(c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

(2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;

(c) The agency improperly excluded or omitted evidence from the record; or

(d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.